

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAMES CARPENTER,

Plaintiff,

vs.

BANK OF AMERICA, N.A., et al.,

Defendant.

CASE NO. 12cv0973-LAB (BLM)

**ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS, WITH LEAVE TO  
AMEND**

I. Introduction

Carpenter previously owned two properties in the San Diego area—one on West Bernardo Drive in San Diego proper (the “West Bernardo Property”) and another on Valencia Avenue in Carlsbad (the “Valencia Property”). This case involves BOA’s refusal to modify his loans on the properties, and their subsequent sale in foreclosure. BOA was not the original lender; it just serviced both of the loans.

It is really the West Bernardo loan that’s at issue here. When Carpenter initially requested the loan modifications, the request with respect to the Valencia Property was quickly denied. But Carpenter alleges that he spent a considerable amount of time, money, and energy working with a BOA agent to modify the loan on the West Bernardo Property, and that he was led to believe, falsely, the loan modification would go through.

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1       Specifically, Carpenter attended a loan modification event sponsored by BOA in  
2 August 2011 and spoke with a BOA representative who stated, in Carpenter's words, "that  
3 he could see no problem and that the numbers looked good." After this, in about November  
4 2011, he was put in touch with a person named Joe Brown, who insisted that they start from  
5 scratch and resubmit all of Carpenter's paperwork. In the midst of this, however, BOA  
6 apparently decided *not* to modify Carpenter's West Bernardo loan, and it recorded a Notice  
7 of Default and initiated foreclosure proceedings. Brown told Carpenter on February 3, 2012  
8 that he had requested a postponement of a February 6 foreclosure sale, but the sale went  
9 forward. And later, around February 7, Brown told Carpenter he requested that the  
10 foreclosure sale be rescinded, but again, this was denied.

11       Carpenter brings five claims: (1) negligence; (2) promissory estoppel; (3) negligent  
12 misrepresentation; (4) elder abuse; and (5) unfair and deceptive acts and practices.  
13 Carpenter's essential grievance is that he was misled by BOA about the possibility of a loan  
14 modification—as well as the subsequent possibility of a foreclosure postponement and  
15 rescission—and that as a result he wasted time, money, and energy and was not able to  
16 pursue other options to save his properties.

17 **II. Legal Standards**

18       A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency  
19 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering such a  
20 motion, the Court accepts all allegations of material fact as true and construes them in the  
21 light most favorable to the non-moving party. *Cedars-Sinai Med. Ctr. v. Nat'l League of  
Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007). To defeat a 12(b)(6) motion, a  
23 complaint's factual allegations needn't be detailed; they must simply be sufficient to "raise  
24 a right to relief above the speculative level . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
25 555 (2007). However, "some threshold of plausibility must be crossed at the outset" before  
26 a case can go forward. *Id.* at 558 (internal quotations omitted). A claim has "facial  
27 plausibility when the plaintiff pleads factual content that allows the court to draw the  
28 reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*

1     *Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a ‘probability  
 2 requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
 3 unlawfully.” *Id.*

4         While the Court must draw all reasonable inferences in Carpenter’s favor, it need not  
 5 “necessarily assume the truth of legal conclusions merely because they are cast in the form  
 6 of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.  
 7 2003) (internal quotations omitted). In fact, the Court does not need to accept any legal  
 8 conclusions as true. *Iqbal*, 556 U.S. at 678. A complaint does not suffice “if it tenders naked  
 9 assertions devoid of further factual enhancement.” *Id.* (internal quotations omitted). Nor  
 10 does it suffice if it contains a merely formulaic recitation of the elements of a cause of action.  
 11 *Bell Atl. Corp.*, 550 U.S. at 555.

12         Leave to amend must “be freely given when justice so requires.” Fed. R. Civ. P.  
 13 15(a). This policy is applied with “extraordinary liberality.” See *Morongo Band of Mission*  
 14 *Indians v. Rose*, 893 F.2d 1074, 1079 (9<sup>th</sup> Cir. 1990). “There exists a presumption under Rule  
 15 15(a) in favor of granting leave to amend.” See *Eminence Capital, LLC v. Aspeon, Inc.*, 316  
 16 F.3d 1048, 1052 (9<sup>th</sup> Cir. 2003).

### 17     **III. Discussion**

18         The Court will address each of Carpenter’s causes of action in sequence.

#### 19     **A. Negligence**

20         A negligence claim has to start with a duty of care. *United States Liability Ins. Co. v.*  
 21 *Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 594 (1970). “[A]s a general rule, a financial institution  
 22 owes no duty of care to a borrower when the institution’s involvement in the loan transaction  
 23 does not exceed the scope of its conventional role as a mere lender of money.” *Nymark v.*  
 24 *Heart Fed. Savings & Loan Ass’n*, 231 Cal.App.3d 1089, 1096 (Cal. Ct. App. 1991). This  
 25 rule has been applied to loan servicers. See *Shepherd v. American Home Mortg. Servs.,*  
 26 *Inc.*, 2009 WL 4505925 at \*2 (E.D. Ca. Nov. 20, 2009) (“In fact loan servicers do not owe a  
 27 duty to the borrowers of the loans they service.”); *Mulato v. WMC Mortg. Corp.*, 2009 WL  
 28 3561536 at \*3 (N.D. Cal. Oct. 27, 2009).

1 Carpenter relies on this Court's recent decision in *Johnson v. HSBC Bank USA, N.A.*  
2 to argue that BOA *did* owe him a duty of care because it "has gone beyond the typical  
3 lender's role." 2012 WL 928433 at \*4 (S.D. Cal. Mar. 19, 2012). *Johnson* is distinguishable  
4 from this case. The bank plausibly went beyond the typical lender's role in that case  
5 because, on the facts alleged, it actually established a loan modification plan, charged  
6 excessive interest, filed derogatory reports with credit bureaus, and didn't even have the  
7 legal authority to demand payments. The Court would also distinguish *Garcia v. Ocwen*  
8 *Loan Servicing, LLC*, 2010 WL 1881098 (N.D. Cal. 2010), from this case. In *Garcia*, the  
9 court concluded that a loan servicer arguably owed a duty of care to a loan modification  
10 applicant, and it reached this conclusion by considering the familiar five-factor test for  
11 determining whether a financial institution owes a duty of care to a borrower-client  
12 announced in *Nymark*. But in context, the duty of care identified in *Garcia* was really a duty  
13 to properly route loan modification paperwork. *Id.* at \*2–3. It was not a duty to give the  
14 distressed homeowner the answer he wants with respect to a loan modification.

15 Even if the Court is wrong here, and BOA exceeded the typical lender's role merely  
16 by hosting a loan modification event that Carpenter attended—thereby assuming a duty of  
17 care—the Court would still find that Carpenter has failed to state a claim. This is because  
18 Carpenter's factual allegations fall short of establishing that BOA actually *breached* its duty.  
19 All Carpenter alleges, really, is that a BOA agent told him a loan modification looked  
20 possible, and that after he submitted the formal paperwork his application was denied. He  
21 alleges no facts from which it can be inferred that his application was mishandled, or that he  
22 was affirmatively misled, or that the decision not to modify his loan was so unreasonable as  
23 to be negligent. Indeed, what Carpenter really wants to do here is transform his  
24 disagreement with a loan modification decision into a negligence claim. He claims in his  
25 Complaint that "[h]ad Defendant exercised ordinary care and skill, it would not have denied  
26 Plaintiff's modification request as Plaintiff had sufficient income to qualify for and pay on a  
27 loan modification." (Compl. ¶ 38.) That's a kind of policy disagreement with BOA; it doesn't  
28 support the allegation that BOA breached a duty of care it owed to him.

1 BOA's motion to dismiss Carpenter's negligence claim is **GRANTED WITH LEAVE**  
 2 **TO AMEND.** Carpenter has alleged insufficient facts to suggest BOA owed him a duty of  
 3 care, and even looking beyond that he has alleged virtually no facts to suggest that BOA  
 4 breached any duty of care it did owe him.

5 **B. Promissory Estoppel**

6 The elements of a promissory estoppel claim are "(1) a promise clear and  
 7 unambiguous in its terms; (2) reliance by the party to whom the party is made; (3) [the]  
 8 reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel  
 9 must be injured by his reliance." *Advanced Choices, Inc. v. State Dep't of Health Servs.*, 182  
 10 Cal.App.4th 1661, 1672 (Cal. Ct. App. 2010).

11 Carpenter manifestly fails to allege facts sufficient to satisfy the first prong—that clear  
 12 and unambiguous promises were made to him respecting the modification of his loan. All  
 13 he alleges is that, on a preliminary screening of his loan, a BOA representative said he could  
 14 see no problem with a modification, and that subsequently another BOA representative, Joe  
 15 Brown, said he would *request* that the foreclosure sale be postponed and, after that,  
 16 rescinded. In no way does Carpenter allege that he was *promised* a loan modification, or  
 17 a postponed or rescinded foreclosure sale. That pleading failure alone is grounds for  
 18 dismissal of this cause of action.

19 BOA's motion to dismiss Carpenter's promissory estoppel claim is **GRANTED WITH**  
 20 **LEAVE TO AMEND.** The factual allegations in support of this cause of action are simply too  
 21 thin and conclusory. See *Iqbal*, 556 U.S. at 678.

22 **C. Negligent Misrepresentation**

23 Negligent misrepresentation requires "(1) the misrepresentation of a past or existing  
 24 material fact by defendant, (2) without reasonable ground for believing it to be true, (3) with  
 25 intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on his  
 26 misrepresentation, and (5) resulting damage." *Apollo Capital Fund LLC v. Roth Capital*  
 27 *Partners LLC*, 158 Cal.App.4th 226, 243 (Cal. Ct. App. 2007).

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1       Carpenter fails to plead any elements of this cause of action with the requisite  
 2 specificity. Even worse, he pleads precisely the kind of “naked assertions devoid of further  
 3 factual enhancement” that the Supreme Court held in *Iqbal* cannot survive a motion to  
 4 dismiss. *Iqbal*, 556 U.S. at 1949. Carpenter fails to explain the misrepresentation in a BOA  
 5 agent indicating that he *believes* a loan modification is possible, and in another BOA agent  
 6 saying he will *request* the postponement and rescission of a foreclosure sale. He also  
 7 alleges no facts from which the Court can infer that the agents had no reasonable grounds  
 8 to support their statements. All Carpenter does is turn the elements of the cause of action  
 9 into bullet-pointed factual allegations in his complaint. A complaint will not survive a motion  
 10 to dismiss, however, if it contains a merely formulaic recitation of the elements of a cause  
 11 of action. *Bell Atl. Corp.*, 550 U.S. at 555.

12       BOA’s motion to dismiss Carpenter’s negligent misrepresentation claim is **GRANTED**  
 13 **WITH LEAVE TO AMEND.**

14       **D. Violation of Elder Abuse Act**

15       The Court agrees with BOA’s argument that the facts of this case are a square peg  
 16 and the Elder Abuse Act is a round hole. Ever since the collapse of the housing market and  
 17 the ensuing shock on the nation’s financial system, the Court has seen countless cases like  
 18 this one, all filed by distressed homeowners with grievances against their mortgage lender  
 19 or loan servicer. The claims are more or less the same across those cases, and violation  
 20 of the Elder Abuse Act is not one of them. Carpenter probably ladles it onto his complaint  
 21 because he is age-eligible, but he alleges no other facts to satisfy the elements of the claim.  
 22 The Court also finds that *Negrete v. Fidelity and Guar. Life Ins. Co.*, 444 F.Supp.2d 998  
 23 (C.D. Cal. 2006) is distinguishable. It is not a wrongful foreclosure case, for starters, and  
 24 also involves a set of facts that are an altogether different fit for the underlying offense of  
 25 elder abuse. BOA’s motion to dismiss the Elder Abuse Act claim is therefore **GRANTED**,  
 26 and this claim is **DISMISSED WITH PREJUDICE**.

27       **E. Violation of California Business and Professions Code § 17200**

28       To state a claim for violation of the Business and Professions Code, Carpenter must

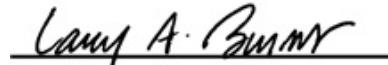
1 allege a violation of statutory or common law. *Lazar v. Hertz Corp.*, 69 Cal. App. 4<sup>th</sup> 1494,  
2 1505 (Cal. Ct. App. 1999) (“In effect, the UCL borrows violations of other laws—such as the  
3 state’s anti-discrimination laws—and makes those unlawful practices actionable under the  
4 UCL.”). The Court finds that Carpenter alleges inadequate facts to show an independent  
5 violation of § 17200, and the failure of his other claims above means the § 17200 claim  
6 cannot be staked on them. BOA’s motion to dismiss this claim is therefore **GRANTED WITH**  
7 **LEAVE TO AMEND.**

8 **IV. Conclusion**

9 For the reasons set forth above, BOA’s motion to dismiss is **GRANTED**. Within two  
10 weeks of the date this order is entered, Carpenter may file a first amended complaint that  
11 re-alleges all of the claims except for the elder abuse claim.  
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13 **IT IS SO ORDERED.**

14 DATED: December 28, 2012

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16 **HONORABLE LARRY ALAN BURNS**  
United States District Judge  
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